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No. 07-1309

IN THE
Supreme Court of the United States

EDMUND BOYLE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 12,800 attorneys and 35,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors.[1] NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights, and has a keen interest in ensuring that criminal proceedings are handled in a proper and fair manner. To promote these goals, NACDL has frequently appeared as *amicus curiae* before the Court in cases concerning substantive criminal law and criminal procedure.

This case presents a question concerning the proper interpretation of RICO that is of vital importance to defense lawyers and criminal defendants. The position taken by the United States in this case, and affirmed below, eliminates an essential element of a RICO offense in certain cases. It will expand the statute's coverage beyond its

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6 *amicus curiae* NACDL states that no counsel for a party authored any part of this brief, and no person or entity, other than NACDL, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

already imprecise limits and sweep in conduct Congress intended to exclude. NACDL respectfully submits this brief as *amicus curiae* in support of petitioner.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the district court instructed the jury that it "may find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts." A:771-72. The Second Circuit Court of Appeals subsequently affirmed Petitioner's conviction without discussing the jury instruction or the sufficiency of the evidence regarding the alleged enterprise, presumably relying on its own precedent upholding similar instructions.

As demonstrated herein, the decision of the Second Circuit in this case, and the decisions upon which it relied, are inconsistent with the plain language and legislative history of RICO; with the intent of Congress in enacting RICO; and with decisions of other courts of appeals and this Court construing the statute. The notion that a RICO enterprise need not have a structure or organization apart from the enterprise's underlying crimes themselves would expand RICO from a prohibition against certain federal and state crimes committed in the course of managing the affairs of an ascertainable organization into a sanction against multiple criminality of almost any sort.

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., was enacted in 1970 to address a growing concern over organized criminality and its impact on legitimate businesses. As its name implies, the legislation made a federal felony the commission of certain conduct when that conduct bore a specific relationship to an "Organization." The concept of an "enterprise" affecting interstate commerce not only addressed federal jurisdictional requirements but was a limitation on the statute's scope. The drafters intended RICO to apply only to those patterns of specified crimes which had a statutorily defined effect on an "enterprise," an organization which was either a traditional legal entity or a *de facto* one. *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986) ("The central role of the concept of enterprise under RICO cannot be overstated. It is precisely the criminal infiltration and manipulation of organizational structures that created the problems which led to the passage of RICO.").

RICO eliminated the necessity for federal prosecutors to prove "a single agreement as in a conspiracy case."[2] Rather, the focus was upon

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[2] *United States v. Kragness*, 830 F.2d 842, 855 (8th Cir. 1987); *see also Kotteakos v. United States*, 328 U.S. 750, 755 (1946); *United States v. Riccobene*, 709 F.2d 214, 224-25 (3d Cir. 1983) ("[W]e agree with the Fifth Circuit that Congress intended that 'a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single "enterprise" conspiracy' if the defendants have agreed to commit a substantive RICO offense.") (*quoting United States v.*

"enterprise criminality";[3] *i.e.*, broader and more diverse forms of criminal activity in defined relationships with an "enterprise." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1990) (liability "depends on showing that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs"); *see also Bachman v. Bear Stearns*, 178 F.3d 930, 932 (7th Cir. 1999); *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (1997) (Posner, J.) ("RICO, however, is not a conspiracy statute. Its draconian penalties are not triggered just by proving conspiracy. 'Enterprise' connotes more. Just how much more is uncertain . . . ").

Enterprise is an element of a RICO crime, separate and distinct from the other elements, including the requirement of a "pattern of racketeering activity." *See, e.g., United States v. Turkette*, 452 U.S. 576, 583 (1981) ("The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages."); *Stachon v. United Consumers*

Sutherland, 656 F.2d 1181, 1192 (5th Cir. 1981)), *abrogation on other grounds recognized by United States v. Vastola*, 989 F.2d 1318, 1330 (3d Cir. 1993).

[3] *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) (*citing* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations Act: Basic Concepts–Criminal and Civil Remedies*, 53 Temple L.Q. 1009, 1013-14 (1980)). Professor Robert Blakey has been identified by this Court as the "principal draftsman" of the RICO statute. *See Tafflin v. Levitt*, 493 U.S. 455, 461 (1990).

Club, Inc., 229 F.3d 673, 675 (7th Cir. 2000) ("[A] RICO enterprise is 'more than a group of people who get together to commit a pattern of racketeering activity.'") (*quoting Richmond v. Nationwide Cassell LP*, 52 F.3d 640, 645 (7th Cir. 1995)). Finally, a RICO enterprise must be distinct from the underlying predicate criminal offenses. *Kragness*, 830 F.2d at 855.

As Petitioner points out, the Second Circuit has taken a different view of the enterprise element than most other circuits. *See* Petitioner Br. at 6-9. Its decisions, upon which it presumably relied in affirming the judgment in this case, effectively eliminate the statute's enterprise requirement and permit conviction based on evidence that an alleged enterprise is no more than the sum of its predicate acts themselves.

This Court should reverse and hold definitively that a RICO enterprise requires structure apart from a random association of individuals to commit crime. RICO did not and could not create a federal felony for "a pattern of racketeering activity." If an alleged RICO enterprise need not have structure, then the statute's explicit enterprise requirement is meaningless.

ARGUMENT

I. THE STATUTORY LANGUAGE DEMONSTRATES THAT A RICO ENTERPRISE MUST POSSESS STRUCTURE OR ORGANIZATION INDEPENDENT OF ITS UNDERLYING CRIMINAL ACTS.

The starting point for interpreting a statute is the language of the statute itself. *See Turkette,* 452 U.S. at 580; *Lewis v. United States*, 445 U.S. 55, 60 (1980). Absent a clearly expressed legislative intent, that language must ordinarily be regarded as conclusive. *See Turkette,* 452 U.S. at 580.

RICO defines "enterprise" as any of a number of legal entities and then "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The question is whether an association in fact need have none of the attributes of the more formal entities identified in the language which directly precedes it. The answer is not subject to doubt.

A statute must be construed to give effect to all of its provisions. *See, e.g.*, *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section, as the Government's interpretation requires." (internal

quotation marks and citations omitted)). In construing a statute, the intention of Congress and the meaning of the statute are ascertained by viewing the whole and every part of the statute, in order to give independent effect to each clause and word and to avoid redundancy. *See Colautti v. Franklin,* 439 U.S. 379, 392 (1979); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

In *Turkette,* this Court applied these principles to the same statutory language at issue here and held that "the Government must prove ***both*** the existence of an 'enterprise' ***and*** the connected 'pattern of racketeering activity.'" 452 U.S. at 583 (emphasis added). The Court recognized that the terms refer to two separate and distinct concepts in the statute: "The 'enterprise' is an entity, [ ] a group of persons associated together for a common purpose of engaging in a course of conduct. The 'pattern of racketeering activity' is, on the other hand, a series of criminal acts as defined by the statute." *Id*. The Court reached the obvious conclusion that the "'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages . . . The existence of an enterprise at all times remains a separate element which must be proved by the Government." *Id*.

The Second Circuit's construction is at odds with these fundamental principles of statutory interpretation and the Court's application of them in *Turkette*. Though ostensibly grounded in *Turkette*

(*see infra* Part III), the Second Circuit's position applies "RICO to situations where the enterprise [is], in effect, no more than the sum of the predicate racketeering acts." *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983). The Second Circuit view effectively renders the "enterprise" element of a RICO offense interchangeable with the "pattern of racketeering" element. Pursuant to this view, § 1962(c) becomes internally redundant and important statutory phrases are rendered superfluous.

Indeed, if a RICO "enterprise" could be identified and its existence proven only by reference to commission of a "pattern of racketeering activity," it loses any definitional significance and effectively ceases to be the separate element mandated by Congress. If a "pattern of racketeering activity" can itself be an enterprise, then the statutory phrases "employed by or associated with any enterprise" and "the conduct of such enterprise's affairs [through a pattern of racketeering activity]" add nothing to the meaning of the provision. *See* 18 U.S.C. § 1962(c).

The form of the § 1961(4) definition of "enterprise" invokes the traditional doctrine of statutory construction *noscitur a sociis*, or "it is known from its associates." Pursuant to this doctrine, "the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it." *Black's Law Dictionary* 1060 (8th ed. 2004). As the Court has recognized: "The maxim *noscitur a sociis*, that a word is known by the

company it keeps . . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).[4]

Applying the doctrine to the § 1961(4) definition of "enterprise," the juxtaposition of the two phrases in the latter portion of § 1961(4) -- *i.e.*, "associated in fact" and "although not a legal entity" -- means that "associated in fact" entities have attributes (such as structure) of the legal entities but not the formal identity. *See, e.g., Limestone Dev. Corp. v. Village of Lemont*, 520 F.3d 797 (8th Cir. 2008). Congress intended to include within its definition of a RICO enterprise Mafia-style criminal organizations that, by their very nature, lacked the imprimatur of a state recognized partnership or corporation. But at the same time, it required that the separate existence of such criminal enterprises

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[4] *See, e.g., United States v. Williams*, 128 S. Ct. 1830, 1839-40 (2008) (utilizing the doctrine of *noscitur a sociis* to find that certain verbs should be interpreted as having a transactional connotation based on the surrounding verbs listed in the statute); *Gutierrez v. Ada*, 528 U.S. 250, 254-55 (2000) (utilizing the doctrine to find that statutory reference to "any election" referred to a gubernatorial election because of the surrounding references to gubernatorial elections); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (utilizing the doctrine to adopt a narrow interpretation of a term in the Paperwork Reduction Act based on the words surrounding the term); *Jarecki*, 367 U.S. at 307 (utilizing the doctrine to find that the word "discovery" in a statute "gathers meaning from the words around it").

bear some resemblance to such legally recognized organizational forms.

Finally, although *amicus* sees no basis for doubt in the statutory language, the disparate interpretations of it in the circuits compels application of the rule of lenity. Pursuant to this rule, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (*quoting Rewis v. United States*, 401 U.S. 808, 812 (1971)). This time-honored interpretive guideline serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.[5] *See id* at 347-48.

II. THE LEGISLATIVE HISTORY OF RICO INDICATES THAT CONGRESS INTENDED AN ENTERPRISE TO POSSESS STRUCTURE OR ORGANIZATION.

Were there any doubt about whether an association in fact enterprise must have its own

[5] Although in *Turkette* the Court found that the rule of lenity did not apply in connection with its consideration of RICO, the Court's reasoning in that case is not applicable here. In *Turkette*, the Court declined to apply the rule based on its determination that RICO is unambiguous insofar as it applies to both legitimate and illegitimate enterprises. 452 U.S. at 587 n.10. That is not the issue in this case.

identity, examination of the legislative history and purpose of RICO lays it to rest.

RICO's legislative history does not provide a definitive statement of Congressional intent regarding the precise breadth of the term "enterprise," but it does illuminate the intended meaning of the term. The legislative history makes plain -- and this Court has recognized -- that the primary purpose of § 1962 was to prevent organized crime from infiltrating businesses and other legitimate economic entities. *See Turkette*, 452 U.S. at 591; *Iannelli v. United States*, 420 U.S. 770, 786-87 & n.19 (1975). The legislative history of RICO indicates that Congress intended the statute to deal broadly with the problem of organized crime in all its forms. And for the question before the Court in this case, the emphasis is on "organized."

While the statute's reach is not limited exclusively to Mafia-style organized crime, Congress was legislating a new weapon against it, so the nature of organized crime as Congress understood it is instructive. It included the "association in fact" language in the definition so that true associations would not escape coverage simply because they were not legally recognized entities. Organized crime families are of course not legal entities, and the statute would have had little impact on the problem being addressed if it excluded them.

The President's Commission on Law Enforcement and Administration of Justice

(commonly referred to as the "Katzenbach Commission") studied organized crime in the United States from 1965 to 1967. In its report, which received wide attention, it focused extensively on a paper by sociologist Donald Cressey that analyzed the historical roots and contemporary structure of organized crime. *See* President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, at 24-60 (1967). Dr. Cressey observed that an "organized criminal" is one who has "committed a crime while occupying an organizational position for committing that crime." *Id*. Dr. Cressey repeatedly used the term "enterprise" to characterize such criminal organizations, and in doing so provided the intellectual underpinning for the term's ultimate inclusion in RICO. *Id*. Later, in a report on the Organized Crime Control Act of 1970, the Senate Judiciary Committee relied heavily on the Katzenbach Commission's report and Dr. Cressey's focus on the structure of organized crime in noting:

> [The Mafia family] organization is rationally designed with an integrated set of positions geared to maximize profits and to protect its members, particularly its leadership, from law enforcement activity. Unlike the criminal gangs of the past, the organization functions regardless of individual personnel changes; no one individual is indispensable.

S. REP. No. 91-617 at 36 (1969).

That description bears no resemblance to the amorphous band of burglars accused of being an "enterprise" in this case. Without some requirement of structure and continuity, the "crew" identified as the RICO enterprise here is precisely like "the criminal gangs of the past" rather than the more organized and therefore more societally dangerous sophisticated criminal organizations that pose a threat of continued criminal activity. As we demonstrate below, Congress did not intend to cover such groups under RICO and it did not do so.

Congress's focus on organized crime is evident in the "Statement of Findings and Purpose" that prefaced the Act. The Statement noted: "*It is the purpose of this act to seek the eradication of organized crime in the United States* . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (emphasis added). The Statement further provided:

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity . . . (2) organized crime derives a major portion of its power through money obtained from . . . illegal endeavors . . . and (5) organized

> crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

Id. at 922-23.

Organized crime was the focus of discussion throughout the legislative consideration of the Act precisely because it was organized and had a structure that posed the threat of sophisticated and continuing criminality. The Senate Judiciary Committee report stated that RICO "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce . . . [t]he magnitude of the problem makes it clear that all legitimate methods of combating organized crime must be utilized." S. REP. NO. 91-617 at 76 (1969).

The House Report reflected Congressional intent to reach wholly criminal organizations that lacked *de jure* legal status and noted that the definition of "enterprise" under the Act includes "associations in fact as well as legally-recognized 'associative entities' . . . Thus, infiltration of any

associative group can occur." H.R. REP. NO. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4032; *see also* S. REP. 91-617 ("Infiltration of any associative group . . . can be reached."). Similarly conducting the affairs of an enterprise through a pattern of racketeering acts connotes the same necessary relationship between the enterprise and the pattern of crimes. The House Report's reference to "infiltration" and utilization of the term "entities" denote that Congress intended the statute to cover enterprises that have an independent, self-contained existence separate from the enterprise's pattern of racketeering activity. *See United States v. Anderson*, 626 F.2d 1358, 1371 (8th Cir. 1980). Carrying out a limited number of racketeering activities on an ad hoc basis simply cannot establish the existence of an "entity" capable of "infiltration."

Floor debates reveal the same focus. Senator Hruska, co-sponsor of the bill that ultimately became the RICO statute, explained that "[w]e must give no mercy to the soldiers of organized crime." 116 Cong. Rec. 602 (1970). Senator Yarborough affirmed, "[i]t is time for us to muster our forces and fight to save our society, through a full-scale attack on organized crime." *Id.* And Representative Rodino later emphasized: "Drastic methods to combat . . . [organized crime] are essential, and we must develop law enforcement measures at least as efficient as those of organized crime . . . [The Act will provide] the basis for an effective national program and generate a truly full-scale commitment to destroy the

insidious power of organized crime groups" *Id*. at 35199.[6]

At the same time, Congress understood the danger of potentially limitless coverage and believed that the creation of a crime based on relationships between actors and enterprises would prevent unintended applications such as the one at issue here.

Representative Celler, Chairman of the House Subcommittee that considered the Act, stated at the outset of the Subcommittee hearings:

> [W]e must take care to identify those types of criminal offense which we classify as "organized crime." The need to define the target of this legislation and to circumscribe the reach of the substantive as well as the procedural

[6] Congress's concern with organized crime was also noted in remarks by Representative McDade, 116 Cong. Rec. at 35216 ("[O]rganized crime presents a direct threat to a nation which seeks to restore a sense of dignity and majesty to the law"); Senator Scott, *id*. at 819 ("[RICO's] purpose is to eradicate organized crime in the United States"); Representative Mayne, *id*. at 35300 (stating organized crime "must be sternly and irrevocably eradicated"); Representative Brotzman, *id*. at 35309 ("Organized crime has become a cancerous element in our society which must be eradicated"); and Representative Sikes, *id*. at 35310 ("Congress should leave no stone unturned in our efforts to insure that every step within our power has been taken to curb this growing threat to the domestic peace and to the internal security of the Nation").

> provisions is underscored by [a statement from the 1967 report of the President's Commission on Law Enforcement and Administration of Justice] . . . Thus, when we speak of "organized crime" we must not generalize -- we must define our terms and focus on specifics. Comparable precision is essential in developing a federal legislative program to eradicate organized crime.

Organized Crime Control: Hearings on S. 30, and related proposals Before the Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 77 (1970). And Senator McClellan observed:

> The danger that a commission of such offenses by other individuals would subject them to proceedings under title IX is (small) . . . since commission of a crime listed under title IX provides only one element of title IX's prohibitions. Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under title IX.

John L. McClellan, *The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame L. Rev. 55, 144 (1970).

It is of course well established by now that RICO is not limited to organizations like the Mafia. Its plain language and numerous decisions have settled that question. That RICO was intended to be a flexible weapon to combat emerging forms of organized crime does not mean that Congress intended the statute to apply when criminals were not "organized" or that evidence at a trial need not prove the enterprise has a structure separate from the criminal acts themselves. This Court should now eliminate any confusion or doubt on these questions.

III. THIS COURT'S INTERPRETATION OF A RICO ENTERPRISE IN OTHER CASES CONTEMPLATES STRUCTURE OR ORGANIZATION.

During this Court's long history of interpretation of the unique elements of a RICO offense, it has defined an overall structure of the statute and interpreted Congress's use of its key terms. The Court's interpretation of the meaning of the central statutory term "enterprise" when clarifying other key statutory terms demonstrates that the Second Circuit's approach not only misconstrues the enterprise element but also upsets the carefully crafted balance this Court has emphasized among RICO's key elements. Requiring an enterprise to have structure maintains enterprise and pattern as separate elements and properly targets individuals who infiltrate legitimate organizations or conduct their affairs through racketeering activity.

This Court's early decision in *Turkette* provided a rationalized view of the entire statute. It focused on the critical relationship between the pattern and enterprise elements which it emphasized were separate. The companion requirement of an enterprise with ongoing structure and organization is inherent in this separateness. In concluding that this statutory definition of a RICO enterprise embraces wholly criminal organizations, the Court described such an organization as "*an entity*," proof of which is established "by evidence of *an ongoing organization*, formal and informal, and by evidence that the various associates function as *a continuing unit*." *Id.* at 583 (emphasis added). Structure is implicit in the notions of continuity and organization.[7]

In addition, the Court specifically distinguished the "enterprise" element from the "pattern" element and identified the relationship between them, noting that an enterprise "is an entity separate and apart from the pattern of activity in which it engages." *Id.* In contrast to an enterprise, a

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[7] *Compare Black's Law Dictionary* 573, 1133 (8th ed. 2004) (defining "entity" as "[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members" and an "organization" as a "body of persons (such as a union or corporation) formed for a common purpose") *with The American Heritage Dictionary* (4th ed. 2000) (defining "structure" as "[s]omething made up of a number of parts that are held or put together in a particular way") *and Merriam-Webster's Collegiate Dictionary* 1167 (10th ed. 1993) (defining "structure" as "something arranged in a definite pattern of organization" and "organization of parts as dominated by the general character of the whole").

pattern "is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise." *Id.* In a phrase frequently quoted by lower courts, this Court noted that "[w]hile the proof used to establish these separate elements may in particular cases coalesce, *proof of one does not necessarily establish the other*." *Id.* (emphasis added). The distinction between a pattern and an enterprise was emphasized yet again when this Court concluded by stating: "[T]he existence of an enterprise *at all times* remains a separate element which must be proved by the Government." *Id.* (emphasis added). This same principle has been repeatedly recognized by the Court's post-*Turkette* cases addressing other RICO elements. *See, e.g., Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985).

Separate "pattern" and "enterprise" elements are not only inherent in the language and structure of RICO but are also consistent with RICO's underlying preventive purpose. *Turkette* recognized RICO's "preventive" purpose and Congressional concern with organized crime's infiltration of legitimate businesses. *Id.* at 593. An enterprise need not be legitimate to fall under RICO because a criminal enterprise also poses an ongoing threat as it acquires money and power. *See id.* Thus, the concern was not simply that some organization exist but also that it function as a "continuing unit." *Id.* at 583. This concern is echoed in *H.J.* where the Court added further definitional clarity to the "pattern" element and concluded that a pattern requires not

only a relationship between predicate acts but also a "threat of continuing activity." *H.J., Inc. v. NW. Bell Tel. Co.*, 492 U.S. 229, 239 (1989). "Congress was concerned in RICO with long term criminal conduct." *Id*. at 242.

The ability of an organization to pose an ongoing threat was at the core of *Turkette*. It recognized that once an enterprise develops some revenue and power, it can use that power "as a springboard into the sphere of legitimate enterprise." *Turkette*, 452 U.S. at 591. In other words, an enterprise that is organized enough to develop this power presents an ongoing threat of long term criminal conduct. *Turkette's* definition of an enterprise was meant to capture those organizations that pose such an ongoing threat.

The Court's recognition of Congressional concern about the ongoing activities of an enterprise is also reflected in *Reves*, 507 at 170. *Reves* held that the phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" in section 1962(c) means that a person must participate in the operation or management of an enterprise. *Id*. at 185. *Reves's* test finds support in RICO's purpose of prohibiting the infiltration of legitimate organizations. Id. at 180-81. Accordingly, prosecutors must show that defendants operated or managed "'the *enterprise's* affairs,' not just their *own* affairs." *Id*. (emphasis in original). If the enterprise is simply an amorphous pattern of activities, it has no affairs and there is no way to identify the ongoing enterprise as separate and managed by the

individuals. The operation-management test has meaning only when there is an enterprise with affairs of its own that an individual can manage. Structure is a necessary part of determining when there is such an entity.

The Third,[8] Fourth,[9] Fifth,[10] Sixth,[11] Seventh,[12] Eighth,[13] and Tenth[14] Circuits require evidence of some level of structure to prove the existence of an enterprise. For example, the Third Circuit has concluded that "[t]here must be some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis." *Riccobene*, 709 F.2d at 222. *Accord Smith*, 413 F.3d at 1266-67 (adopting the *Riccobene* framework). Thus, the Third Circuit requires that, "[t]o satisfy this [ongoing organization] element, the government must show that some sort of structure exists within the group for the making of decisions,

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[8] *Riccobene*, 709 F.2d at 222.

[9] *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985).

[10] *Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1461 (5th Cir. 1991).

[11] *United States v. Tocco*, 200 F.3d 401, 425 (6th Cir. 2000).

[12] *United States v. Olson*, 450 F.3d 655, 664 (7th Cir. 2006).

[13] *Kragness*, 830 F.2d at 855; *United State*s v. *Bledsoe*, 674 F.2d 647, 664 (8th Cir. 1982).

[14] *United States v. Smith*, 413 F.3d 1253, 1266-67 (10th Cir. 2005).

whether it be hierarchical or consensual." *Riccobene*, 709 F.2d at 222.[15]

The structure requirement that these circuits have articulated flows naturally from *Turkette* and *H.J.* Indeed, these circuits found their structure requirements in the language of *Turkette*. The Third Circuit, for example, first identified a structure requirement when explaining how each of the enterprise elements enumerated in *Turkette* must be demonstrated to prove an enterprise. *Riccobene*, 709 F.2d at 222. Likewise, the Seventh Circuit noted that it was "[e]choing" the language of *Turkette* when it concluded that there must be proof of an ongoing structure to prove an enterprise. *Limestone Dev. Corp.*, 520 F.3d at 805. These courts, and the five others like them, have followed the natural meaning of *Turkette's* discussion of an "entity" with an "ongoing organization" in identifying an important element of an enterprise that makes it distinct—structure. *See, e.g., Neapolitan*, 791 F.2d at 500 ("While the hallmark of conspiracy is agreement, the central element of an enterprise is structure. An enterprise must be more than a group of people who get together to commit a 'pattern of racketeering activity.'").

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[15] *Accord Limestone Dev. Corp.*, 520 F.3d at 805 ("'[E]nterprise' requires proof of 'an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.') (*quoting Richmond,* 52 F.3d at 644)); *Kragness*, 830 F.2d at 856 (finding continuity of structure in an enterprise "exists where there is an organizational pattern or system of authority that provides a mechanism for directing the group's affairs on a continuing, rather than an ad hoc, basis.").

The Second Circuit has failed to identify the true meaning of *Turkette*, and has misinterpreted its language to reject a structure requirement. The Second Circuit's decisions permit conviction "where the enterprise was, in effect, no more than the sum of the predicate racketeering acts." *Bagaric*, 706 F.2d at 55, *abrogated on other grounds by Nat'l Org. for Women*, 510 U.S. at 249. One such decision is *United States v. Mazzei*, where the court relied in part upon this Court's statement that evidence proving an enterprise and a pattern "may coalesce." 700 F.2d 85, 89, 90 (2d Cir. 1983) (*cited in Bagaric*, 706 F.2d at 55). The court ignored the second half of this "coalesce" sentence: "proof of one does not necessarily establish the other." *Turkette*, 452 U.S. at 583. That the evidence may at times coalesce acknowledges the common-sense notion that the same evidence can prove two different and necessary elements; it does not mean that the elements are the same. The Second Circuit permits mere evidence of a pattern to prove an enterprise and considers it "logical to characterize any associative group in terms of what it *does*, rather than by abstract analysis of its structure." *Bagaric*, 706 F.2d at 56 (emphasis in original). Doing so ignores *Turkette's* definition of an enterprise as separate from a pattern and this Court's recognition of Congressional concern about ongoing enterprises.

Other circuits following the Second Circuit's lead also fail to offer sufficient reasons to justify the outcome. The District of Columbia Circuit does not reject any distinction between a pattern and an enterprise, but by allowing the same evidence to

prove both, it reaches the same result. The District of Columbia Circuit acknowledges *Turkette's* admonition that the elements are separate and even identifies "'organization' or 'structure'" as an element needed to prove an enterprise. *United States v. Perholtz*, 842 F.2d 343, 362-63 (D.C. Cir. 1988) (per curiam). The *Perholtz* opinion, however, allows organization to be inferred from a pattern. *Id*. at 363. It fails to give the structure requirement the independent significance required by *Turkette* and will conflate the pattern and enterprise elements.

Likewise, the First, Ninth, and Eleventh Circuits offer no compelling reasons for rejecting a structure requirement. The Eleventh Circuit relied upon its pre-*Turkette* cases when it misconstrued *Turkette's* requirement of an "ongoing organization, formal or informal" to remove all need to prove structure. *See United States v. Cagnina*, 697 F.2d 915, 920-21 (11th Cir. 1983). The Ninth Circuit based its decision on its mistaken belief that an ascertainable structure requirement would require "that the enterprise have a structure serving both illegitimate and legitimate purposes." *Odom v. Microsoft Corp.*, 486 F.3d 541, 551-52 (9th Cir. 2007) (en banc). It found support in the First Circuit's decision of *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001), where the First Circuit observed both that proof of an enterprise and pattern may coalesce and that criminal enterprises "may not observe the niceties of legitimate organizational structures." As we have demonstrated, this reasoning is unpersuasive. The structure requirement does not require all of "the niceties of legitimate

organizational structures" but it does require more than a random association of individuals who commit crimes together. *See, e.g., Riccobene*, 709 F.2d at 222.

This case provides the appropriate vehicle to resolve the inconsistency among the circuits and to make clear that the minority holdings are not correct. A structure requirement is a logical explication of this Court's precedent and necessary to safeguard the integrity of the enterprise element. Without a structure requirement, the "requisite number of acts of racketeering" is all that is needed to prove not only a pattern but also an enterprise. *See Turkette*, 452 U.S. at 583. The decision under review here permitted the jury to find that predicate acts proved an enterprise. That was error. Proving a pattern only demonstrates that some individuals committed more than one crime; it does not demonstrate an enterprise.

IV. ELIMINATING A STRUCTURE REQUIREMENT WILL LEAD TO A HOST OF DELETERIOUS CONSEQUENCES NOT INTENDED BY CONGRESS.

The Second Circuit's construction would effectively read the separate enterprise element out of the statute for enterprises in fact. In that event, RICO would effectively merge with the predicate offenses, federalize state crimes, and become the functional equivalent of a recidivism statute. None of these outcomes serves RICO's purpose and all are unintended and undesirable.

A. Weakening the Enterprise Element Creates the Merger Problems Described in *Santos*.

RICO and its predicate offenses will impermissibly merge if an enterprise can be proven by a pattern. The prospect of the merger of two criminal statutes with vastly disparate punishments was an important consideration in *United States v. Santos*, 128 S. Ct. 2020 (2008).[16] In determining that a more narrow definition of the term "proceeds" in the federal money-laundering statute was appropriate, this Court noted that a broader reading of the term could result in the merging of two criminal statutes with disparate penalties. *Santos*, 128 S. Ct. at 2026 (plurality opinion).[17] The same effect would result here: Eliminating (or in some cases even watering down) the enterprise element would cause RICO to merge with predicate offenses

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[16] Indeed, many federal district courts have placed importance on *Santos*'s discussion of this "merger problem" since its issuance earlier this year. *See United States v. Hedlund*, No. CR-06-346-DLJ, 2008 WL 4183958 (N.D. Cal. Sep. 9, 2008); *United States v. Rezko*, No. 05 CR 691, 2008 WL 4890232 (N.D. Ill. Nov. 12, 2008); *United States v. Baker*, No. 06-cr-20663, 2008 WL 4056998 (E.D. Mich. Aug. 27, 2008); *United States v. Catapano*, No. CR-05-229, 2008 WL 4107177 (E.D.N.Y. Aug. 12, 2008).

[17] Justice Stevens's concurring opinion limited the reach of *Santos*'s holding regarding the scope of the term "proceeds" in the federal money-laundering statute, but he, like the plurality, also addressed the merger problem in coming to his conclusion. *See id.* at 2033-34 (Stevens, J., concurring).

at least when they are committed in a "pattern." The salient difference between RICO and the predicate offenses -- proof of an enterprise separate from the coordination necessary to carry out the crimes -- would no longer prevent these offenses from merging.[18]

RICO's merger with its predicate offenses would have far-reaching and unintended consequences. Merger "radically increase[s] the sentence" for acts that are punished elsewhere in the federal criminal code, and it also affects other aspects of criminal liability, including charging decisions and plea-bargaining. *Id.* at 2027, 2028. There is no indication that Congress intended to create such results any time two predicate acts are committed by any two people. Congress intended, rather, to provide an enforcement mechanism for that theretofore unprosecutable group of separate crimes which relate to or involve an organization. *See supra* Part II. The distinction between an enterprise and a pattern is necessary to respect this legislative intent and avoid the problem of merger.

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[18] A number of courts have recognized that the enterprise element is an important consideration in addressing double jeopardy concerns under the Fifth Amendment. *See, e.g.*, *Kragness*, 830 F.2d at 863-64 (acknowledging RICO's enterprise requirement in rejecting a double jeopardy claim). Indeed, the Eighth Circuit has even noted that "[t]he 'enterprise' element provides an essential ingredient in the constitutionality of the composition and structure of a section 1962(c) offense." *Anderson*, 626 F.2d at 1367. The weakening of the enterprise element could thus alter the conclusions of the many courts that have determined that RICO currently does not present double jeopardy concerns.

B. The Second Circuit's Position Would Transform RICO Into a Recidivist Statute or an Unintentional Federalization of State Crimes.

Because RICO's list of predicate acts includes a broad range of state law criminal offenses, a pattern can be composed exclusively of such offenses. Accordingly, if an enterprise distinct from such a state law pattern is not required, RICO would federalize the commission of two or more designated state offenses for being committed in a pattern. For example, in New York, fourth-degree arson, first-degree gambling promotion, and second-degree obscenity are all Class E Felonies, punishable by up to four years imprisonment. N.Y. Penal Law § 150.05 (1965); N.Y. Penal Law § 225.10 (1965); N.Y. Penal Law § 235.06 (1965). Federal law does not reach most criminal acts that would fall within these state statutes, but under RICO, it reaches all of them. *See* 18 U.S.C.A. § 1961(1) (1970). Elimination of a meaningful enterprise element would create federal jurisdiction over any set of those crimes committed by a common group of individuals.[19]

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[19] RICO would also become little more than a sentencing enhancement for the predicate offenses if an enterprise can be proven by demonstrating a pattern. The same conduct resulting in a maximum penalty of eight years imprisonment for committing two Class E Felonies in New York would be transformed into an additional maximum penalty of twenty years imprisonment under RICO whenever two individuals commit two of those crimes together.

This Court has cautioned that it can not be lightly inferred that Congress intended to alter the balance of federal and state powers. *See Bass*, 404 U.S. at 349-50 (1971). Although Congress intended to somewhat alter that balance with RICO, as in *Bass*, "the legislative history provides scanty basis for concluding that Congress faced these serious questions and meant to affect the federal state balance *in the way now claimed* by the Government." *Id*. at 350 (emphasis added). RICO's intended federalization was limited to that necessary to combat organized crime. *See* Part II, *supra*. There is no indication that Congress intended to go farther. *See Cleveland v. United States*, 531 U.S. 12, 25 (2000) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes.") (internal citations omitted).

Unless the prosecutor must prove an enterprise, the ability to prosecute state predicate crimes in federal courts has no ascertainable limits. It would bring the power and responsibility of federal law enforcement to a host of crimes for which there is otherwise no federal jurisdiction and that have traditionally been the province of states. It will make punishment for the same or similar conduct depend on whether the conduct is charged by federal or state prosecutors.[20]

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[20] In 1997, the Criminal Justice Section of the American Bar Association created a Task Force in response to widespread concern about the increasing federalization of American criminal law that has been occasioned, at least in part, by expansive interpretation of RICO. The Task Force was chaired

RICO is not and was not intended to be a recidivist statute and was certainly not intended to alter the federal state balance to the extent the Second Circuit would permit.[21]

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by former U.S. Attorney General Edwin Meese III. The Task Force's final report (commonly known as the "Meese Report"), issued in 1998, identified a host of adverse consequences caused by inappropriate federalization of criminal law, including, *inter alia*, (i) diminution of the state judicial system and creation of concomitant strain on the resources of the federal system; (ii) creation of inappropriately disparate results for similarly situated defendants, depending on whether their essentially similar conduct is selected for federal or state prosecution; (iii) diminution of a principled basis for selecting a case as a federal or local crime with its attendant divergent consequences; and (iv) an increase in unreviewable federal prosecutorial discretion. *See Report On The Federalization of Criminal Law* at 26-43, Task Force on the Federalization of Criminal Law, American Bar Association Criminal Justice Section (1998).

[21] *See*, *e.g.*, *Bledsoe*, 674 F.2d at 659; Gerard E. Lynch, *Rico: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 721 (1987) ("Because [RICO] is triggered by a wide variety of crimes, and because the preconditions for its invocation are present in a wide range of cases, its availability is far less limited than that of typical special offender or recidivist statutes."). This also greatly enhances the sentencing power of federal prosecutors. *See id.* at 720-21.

CONCLUSION

For the foregoing reasons, and those presented by Petitioner, the decision below should be reversed.

Respectfully submitted,

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